No. S198616

Supreme Court

OF THE

State of California

IN RE CIPRO CASES I & II

Application for Leave to File and Brief of Amicus Curiae Consumer Attorneys of California in Support of Plaintiffs-Appellants

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After a Decision of the California Court of Appeal
Fourth Appellate District, Division One (No. D056361)
San Diego County Superior Court (JCCP Nos. 4154, 4220)
Hon. Richard E.L. Strauss, Judge

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[Service on Attorney General and District Attorney required by Bus & Prof. Code §17209. *See* Cal. Rule of Ct. 8.29.]

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APPLICATION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE CONSUMER ATTORNEYS OF CALIFORNIA

Pursuant to California Rule of Court 8.520(f), Consumer Attorneys of California ("CAOC") respectfully requests leave to file the attached amicus curiae brief in support of plaintiffs-appellants.

CAOC, founded in 1962, is a voluntary non-profit membership organization of approximately 6,000 consumer attorneys practicing in California. Its members predominantly represent individuals subjected to a variety of unlawful and harmful business practices, including consumer fraud, personal injuries, wage and hour violations, and insurance bad faith.

CAOC has taken a leading role in advancing and protecting the rights of consumers in both the courts and the Legislature. This has often occurred through class actions under California's Unfair Competition Law ("UCL") (Bus. & Prof. Code §§ 17200 et seq.). CAOC has participated as an amicus curiae in a series of leading UCL cases decided by this Court, including *Rose v. Bank of America, N.A.*, 57 Cal.4th 390 (2013); *Kwikset Corp. v. Superior Court (Benson)*, 51 Cal.4th 310 (2011); *Clayworth v. Pfizer, Inc.*, 49 Cal.4th 758 (2010); *In re Tobacco II Cases*, 46 Cal.4th 298 (2009); *Californians for Disability Rights v. Mervyn's, LLC*, 39 Cal.4th 223 (2006); *Kraus v. Trinity Management Services, Inc.*, 23 Cal.4th 116 (2000); and *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.*, 20 Cal.4th 163 (1999).

CAOC has a substantive and abiding interest in ensuring that the UCL is correctly interpreted, and in a manner consistent both with this Court's precedents and with the strong public policies underlying the UCL, which the Court has consistently affirmed.

CAOC's proposed amicus brief will assist the Court by offering additional discussion of plaintiffs' UCL claim, which the Court of Appeal disposed of in a single paragraph near the end of its 53-page opinion. *See* Slip op. at 50. The parties' briefing on the UCL claim is not extensive. The parties have

understandably spent most of their efforts on briefing the significant and complex antitrust questions that the case presents. While CAOC fully supports the arguments of plaintiffs-appellants regarding the Cartwright Act claim, the purpose of CAOC's proposed amicus curiae brief is to address the UCL claim.

CAOC's proposed amicus brief urges the Court not to inadvertently adopt a rule that would have the effect of gutting many UCL cases and potentially undermining a very important part of the holding in *Cel-Tech*. As explained in CAOC's proposed brief, the UCL provides an independent statutory remedy for "unfair, unlawful and fraudulent" conduct, and as this Court held in *Cel-Tech*, conduct can be "unfair" within the meaning of the UCL even if it violates no other laws. In this case, the Court of Appeal held that as a matter of law, because the defendants had not violated the Cartwright Act, their conduct could not be "unfair" under the UCL. This reasoning is contrary to *Cel-Tech*.

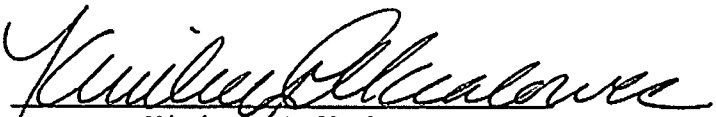
Pursuant to Rule of Court 8.520(f)(4), CAOC affirms that no party or counsel for a party to this appeal authored any part of this amicus brief. No person other than the amicus curiae, its members, and its counsel made any monetary contribution to the preparation or submission of this brief.

For the reasons stated above, CAOC respectfully submits that its proposed brief may be of assistance to the Court in deciding the matter, and therefore requests the Court's leave to file it.

Dated: March 18, 2014

Respectfully submitted,

THE KRALOWEC LAW GROUP

By: 

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I. INTRODUCTION

In this case, the Court of Appeal held that its "conclusion that defendants are not liable under the Cartwright Act" was "***dispositive***" of the UCL claim. Slip op. at 50 (emphasis added).

The analytical approach taken by the Court of Appeal in this case was error. If followed in other cases, the approach could have the effect of gutting many UCL cases and potentially undermining a very important part of this Court's holding in *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.*, 20 Cal.4th 163 (1999).

As explained below, the UCL provides an independent statutory remedy for "unfair" conduct, and as this Court held in *Cel-Tech*, conduct can be "unfair" within the meaning of the UCL even if it violates no other laws. In this case, the Court of Appeal held that as a matter of law, because the defendants had not violated the Cartwright Act, their conduct could not be "unfair" under the UCL.

This reasoning is contrary to *Cel-Tech*, and should be disapproved—regardless of the merits of the substantive UCL claim asserted in this case.

II. DISCUSSION

A. The Court of Appeal's Approach to the UCL Claim Conflicts with This Court's Precedents

At the end of its 53-page opinion, the Court of Appeal disposed of the UCL claim in a single paragraph of text, which relied heavily on a lengthy quotation from another Court of Appeal decision:

> Our conclusion that defendants are not liable under the Cartwright Act for entering into the Cipro agreements is also dispositive of plaintiffs' cause[] of action for violation of the UCL .... "The purpose of federal and state antitrust laws is to protect and promote competition for the benefit of consumers. [Citations.] Antitrust laws are designed to prohibit only unreasonable restraints of trade, meaning conduct that unreasonably impairs competition and harms consumers. [Citations.] If the same conduct is alleged to be both an

> antitrust violation and an 'unfair' business act or practice for the same reason—because it unreasonably restrains competition and harms consumers—the determination that the conduct is not an unreasonable restraint of trade necessarily implies that the conduct is not 'unfair' toward consumers. To permit a separate inquiry into essentially the same question under the unfair competition law would only invite conflict and uncertainty and could lead to the enjoining of procompetitive conduct." (*Chavez v. Whirlpool Corp.* (2001) 93 Cal.App.4th 363, 375; accord, *Drum v. San Fernando Valley Bar Assn.* (2010) 182 Cal.App.4th 247, 254 [conduct that is deemed reasonable and condoned under antitrust law does not violate the UCL].)
>
> ....
>
> The trial court properly granted summary judgment on plaintiffs' cause[] of action for violation of the UCL ... as well as their cause of action for violation of the Cartwright Act.

Slip op. at 50.

The trial court's reasoning was similar, and similarly relegated to a single paragraph at the end of a lengthy ruling:

> Thus, the Court finds that the agreement does not violate the Cartwright Act. This finding also precludes Plaintiffs' UCL claim ... as [it is] based on the same factual allegations that support the Cartwright Act claim. Thus, the Court's determination that the agreement does not violate the Cartwright Act is fatal to ... the UCL claim (*Belton v. Comcast Cable Holdings, LLC* (2007) 151 Cal.App.4th 1224, 1240, quoting *Chavez v. Whirlpool Corp.* (2001) 93 Cal.App.4th 363, 375; see also *RLH Industries, Inc. v. SBC Communications, Inc.* (2005) 133 Cal.App.4th 1277, 1286) ....

11 AA 2676.

Such an analytical approach to the UCL claim is inconsistent with this Court's precedents.

B. A Defendant's Conduct May Violate the UCL's "Unfair" Prong Even if the Conduct Does Not Violate the Cartwright Act

In *Cel-Tech*, this Court closely examined the UCL and rejected the notion that "what is lawful under [other statutes] cannot violate the unfair competition law." 20 Cal.4th at 179. The UCL's disjunctive language mandates that "a practice may be deemed unfair even if not specifically proscribed by some other law. '.... In other words, a practice is prohibited as "unfair" or "deceptive" even if not "unlawful" and vice versa.'" *Id.* at 180 (quoting *Podolsky v. First Healthcare Corp.*, 50 Cal.App.4th 632, 647 (1996)).

Although a "safe harbor" exists for acts expressly allowed by the Legislature, "[i]t is settled that a UCL action is not precluded 'merely because some other statute on the subject does not, itself, provide for the action or prohibit the challenged conduct. To forestall an action under the [UCL], another provision must actually "bar" the action or clearly permit the conduct.'" *Rose v. Bank of America, N.A.*, 57 Cal.4th 390, 398 (2013) (quoting *Cel-Tech*, 20 Cal.4th at 182-83).

The Court further explained that "[t]here is a difference between (1) not making an activity unlawful and (2) making that activity lawful. .... Acts that the Legislature has determined to be lawful may not form the basis for an action under the unfair competition law, but acts may, if otherwise unfair, be challenged under the unfair competition law even if the Legislature failed to proscribe them in some other provision." *Cel-Tech*, 20 Cal.4th at 183; *see also id.* at 184 ("the Legislature's mere failure to prohibit an activity does not prevent a court from finding it unfair").

The UCL was purposefully crafted to be non-specific, and thus broader than other laws, so that courts could remedy "'wrongful business conduct in whatever context such activity might occur. Indeed, ... the section was intentionally framed in its broad, sweeping language, precisely to enable judicial tribunals to deal with the innumerable "new schemes which the fertility of man's invention would contrive."'" *Id.* at 181 (quoting *American Philatelic Soc. v.*

Claibourne, 3 Cal.2d 689, 698 (1935)). "'[G]iven the creative nature of the scheming mind, the Legislature evidently concluded that a less inclusive standard would not be adequate.'" *Id.* (quoting *Barquis v. Merchants Collection Assn.*, 7 Cal.3d 94, 111-12 (1972)).

One of the reasons for the UCL's broad substantive scope is the comparatively limited scope of its remedies. *Cel-Tech*, 20 Cal.4th at 181; *see Bank of the West v. Superior Court*, 2 Cal.4th 1254, 1266-67 (1992) ("In drafting the [UCL], the Legislature deliberately traded the attributes of tort law for speed and administrative simplicity."). "[T]he 'overarching legislative concern [was] to provide a streamlined procedure for the prevention of ongoing or threatened acts of unfair competition.' Because of this objective, the remedies are limited.'" *Zhang v. Superior Court*, 57 Cal.4th 364, 371 (2013) (quoting *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal.4th 1134, 1150 (2003)). "Private plaintiffs suing under the UCL may seek only injunctive and restitutionary relief, and the UCL does not authorize attorney fees." *Rose*, 57 Cal.4th at 399.

Nevertheless, these remedies are "meant to [be] ***cumulative*** to those established by other laws, absent express provision to the contrary." *Rose*, 57 Cal.4th at 398-99 (emphasis in original) (citing Bus. & Prof. Code § 17205).

This Court has repeatedly recognized that if a defendant's conduct violates the Cartwright Act, the conduct also violates the UCL. *E.g.*, *Quelimane Co. v. Stewart Title Guar. Co.*, 19 Cal.4th 26, 42-43 (1998); *Manufacturers Life Ins. Co. v. Superior Court*, 10 Cal.4th 257, 268 (1995). This brief addresses a slightly different question: If a court were to hold that a defendant's conduct does not violate the Cartwright Act,[1] does that mean that the conduct cannot be found "unfair" within the meaning of the UCL?

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[1] CAOC fully supports plaintiffs-appellants' position respecting the Cartwright Act claim in this case. For the reasons extensively briefed by plaintiffs-appellants, that claim was improperly adjudicated in defendants' favor.

Under *Cel-Tech*, the answer to this question is no. Instead, whether the conduct is "unfair" within the meaning of the UCL must be separately analyzed, under the independent legal standards governing UCL claims. This brief next turns to those standards.

C. The UCL's "Unfair" Prong is Not Coextensive With the Cartwright Act, Either in Competitor Actions or in Consumer Actions

In *Cel-Tech*, this Court examined the meaning of "unfair" conduct for purposes of "an action by a competitor alleging anticompetitive practices." 20 Cal.4th at 187 n.12. In such actions,

> we must require that any finding of unfairness to competitors... be tethered to some legislatively declared policy ***or*** proof of some actual or threatened impact on competition. We thus adopt the following test: When a plaintiff who claims to have suffered injury from a direct competitor's "unfair" act or practice invokes section 17200, the word "unfair" in that section means [1] conduct that threatens an incipient violation of an antitrust law, ***or*** [2] violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, ***or*** [3] otherwise significantly threatens or harms competition.

Id. at 186-87 (emphasis added).

Like the UCL's disjunctive language, the Court's disjunctive language in this passage establishes that in a competitor action, conduct may be "unfair" in several possible ways, none of which is coextensive with the Cartwright Act. If the UCL's "unfair" prong and the Cartwright Act were one and the same, the Court would not have pronounced that conduct that "violates the policy or spirit" of the antitrust laws could be "unfair" under the UCL.

Applying that standard to the facts of *Cel-Tech*, the Court concluded that a practice that "***resembles*** in some respects that condemned in" other statutes dealing with the same subject matter "may be considered unfair under the independent provisions of the [UCL] was we have defined it." *Id.* at 188 (emphasis added). That the Legislature "did not consider" a particular set of facts,

and thus did not explicitly prohibit the conduct, simply means that the conduct "may be one of the myriad unanticipated ways in which unfair competition may occur." *Id.* Accordingly, "the trial court erred in concluding that the [UCL] cause of action necessarily failed when the other causes of action failed." *Id.*

In this case, the Court of Appeal (and the trial court) analyzed the UCL claim in a manner that ran afoul of *Cel-Tech* in several respects.

First, the Court of Appeal did not consider or address whether the definition of "unfair" articulated in *Cel-Tech* should apply to this action, which is a consumer action, not a competitor action. As this Court observed in its two most recent UCL opinions, that question remains unresolved. *Rose*, 57 Cal.4th at 399 n.9; *Zhang*, 57 Cal.4th at 380-81 & n.9.

Indeed, a three-way split in authority exists on this point.[2] The three formulations of "unfair" that have developed in the case law for consumer actions are as follows:

(1) **The pre-*Cel-Tech* "balancing" test.** This test "'weighs the utility of the defendant's conduct against the gravity of the harm to the alleged victim" and considers whether the conduct "offends an established public policy or ... is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers." *South Bay Chevrolet v. Gen. Motors Acceptance Corp.*, 72 Cal.App.4th 861, 886-87 (1999) (quoting *State Farm Fire & Cas. Co. v. Superior Court*, 45 Cal.App.4th 1093, 1103-04 (1996)). This Court recently reconfirmed that *Cel-Tech* "did not disapprove" this test "for purposes of consumer actions." *Zhang*, 57 Cal.4th at 381.

(2) **The post-*Cel-Tech* "tethering" test.** This test requires that an "unfairness" finding be predicated on a public policy that is "'tethered' to specific constitutional, statutory or regulatory provisions." *Aleksick v. 7-Eleven, Inc.*,

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[2] *See, e.g., West v. JPMorgan Chase Bank, N.A.*, 214 Cal.App.4th 780, 806 (2013) (discussing three-way split); *In re Insurance Installment Fee Cases*, 211 Cal.App.4th 1395, 1417-18 (2012) (same).

205 Cal.App.4th 1176, 1192 (2012) (citing *Cel-Tech*, 20 Cal.4th at 186-87; *Gregory v. Albertson's, Inc.*, 104 Cal.App.4th 845, 854 (2002)); *see also Jolley v. Chase Home Finance, LLC*, 213 Cal.App.4th 872, 907-08 (2013). Under this test, the UCL condemns conduct that violates the spirit or purpose, if not the letter, of the law.

(3) **The "section 5" test.** This test derives from the Federal Trade Commission Act (15 U.S.C. § 45(n)) and asks whether "(1) the consumer injury is substantial; (2) the injury is not outweighed by any countervailing benefits to consumers or competition; and (3) the injury could not reasonably have been avoided by consumers themselves." *Boschma v. Home Loan Center, Inc.*, 198 Cal.App.4th 230, 252 (2011); *see also Camacho v. Automobile Club*, 142 Cal.App.4th 1394, 1403-05 (2006). This is the most recent test to develop in the case law.

Without considering any of the three tests, without acknowledging the split in authority, and without citing *Cel-Tech*, the Court of Appeal held that the UCL claim was barred because the Cartwright Act claim was. Slip op. at 50. That analysis was error.

Under *Cel-Tech*, whether conduct is "unfair" under the UCL must, at a minimum, be evaluated ***separately*** from whether the conduct violates the Cartwright Act, and the evaluation must be performed using the correct legal standard.

This case is not a proper vehicle for the Court to resolve the three-way split (because the issue has not been briefed). What the Court can and should do, however, is reconfirm its holding in *Cel-Tech* that conduct may be "unfair" even if it does not violate other laws covering the same subject matter, including the Cartwright Act. To approve the Court of Appeal's truncated analysis, which conflated the UCL with the Cartwright Act, would undermine one of *Cel-Tech*'s core teachings: that conduct may be "unfair" even if not "unlawful" and vice versa. 20 Cal.4th at 180. That teaching applies to consumer and competitor actions alike.

The root of the Court of Appeal's error was its heavy reliance on *Chavez v. Whirlpool Corp.*, 93 Cal.App.4th 363 (2001). Indeed, the Court of Appeal's only analysis of the UCL claim consisted of a lengthy quotation from *Chavez*. *See* slip op. at 50.

In *Chavez*, the court recognized that *Cel-Tech*'s discussion of "unfair" "was limited to an action by a competitor, as opposed to an action by a consumer," but nevertheless went on to hold "as a matter of law that conduct that the courts have determined to be permissible under the *Colgate* doctrine cannot be deemed 'unfair' under the [UCL]." 93 Cal.App.4th at 375 (citing *United States v. Colgate & Co.*, 250 U.S. 300 (1919)). Conduct that is "deemed reasonable and condoned under the antitrust laws" cannot be "unfair" under the UCL. *Id.*

Regardless of the substantive merits of the UCL claim considered in *Chavez* (a subject beyond this scope of this brief), the process by which the Court of Appeal disposed of the claim was error. Without analysis, the *Chavez* court assumed that the post-*Cel-Tech* formulation applied in a consumer action, and then used the very reasoning that this Court condemned in *Cel-Tech*—that the UCL claim failed because the Cartwright Act did. This reasoning cannot be squared with *Cel-Tech*'s holding that even in competitor actions, the UCL's "unfair" prong can extend to conduct that does not violate the letter of the antitrust laws.

The reasoning of *Chavez* therefore should be disapproved.

The proper analytical approach is illustrated by *Drum v. San Fernando Valley Bar Assn.*, 182 Cal.App.4th 247 (2010), also cited by the Court of Appeal in this case. *See* slip op. at 50. In *Drum*, the court acknowledged that different standards apply in consumer and competitor actions under the UCL, and then carefully and separately evaluated the facts in light of each of the extant tests for "unfair" conduct, before concluding that the "unfair" claim failed. *Drum*, 182 Cal.App.4th at 253-57.

Such an approach ensures that the UCL's "unfair" prong is not treated as coextensive with other laws, and is consistent with both *Cel-Tech* and *Rose*. Until

the three-way split is resolved, that approach is the one that comports with this Court's directives.

III. CONCLUSION

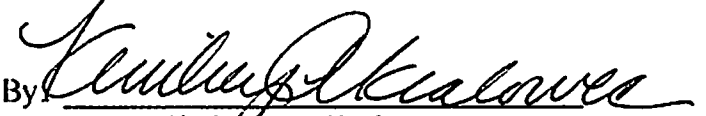
Neither the *Cel-Tech* test for competitor actions, nor any of the three tests developed by the lower courts for consumer actions, dictates that a UCL claim must fail if the defendant's conduct is held to comply with the Cartwright Act, as the Court of Appeal erroneously reasoned.

The Court is respectfully asked not to condone a line of reasoning that could so easily be misapplied in other UCL cases. The Court is instead asked to reverse the Court of Appeal's judgment as to the UCL claim, and either reinstate the claim, or remand to the trial court with directions to reevaluate the claim applying the correct legal standards.

Dated: March 18, 2014

Respectfully submitted,

THE KRALOWEC LAW GROUP

By 
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CERTIFICATE OF COMPLIANCE WITH WORD COUNT REQUIREMENT

The undersigned hereby certifies that the computer program used to generate this brief indicates that the text does not exceed 14,000 words, including footnotes). *See* Rule of Court 8.520(c)(1).

Dated: March 18, 2014


Kimberly A. Kralowec

PROOF OF SERVICE

I, the undersigned, hereby declare under penalty of perjury that the following is true and correct:

I am a citizen of the United States; am over the age of 18 years; am employed by THE KRALOWEC LAW GROUP, located at 188 The Embarcadero, Suite 800, San Francisco, California 94105, whose principal attorney is a member of the State Bar of California and of the Bar of each Federal District Court within California; am not a party to the within action; and that I caused to be served a true and correct copy of the following documents in the manner indicated below:

1. APPLICATION FOR LEAVE TO FILE AND BRIEF OF AMICUS CURIAE CONSUMER ATTORNEYS OF CALIFORNIA IN SUPPORT OF PLAINTIFFS-APPELLANTS; and
2. PROOF OF SERVICE.

☑ **By Mail**: I placed a true copy of each document listed above in a sealed envelope addressed to each person listed below on this date. I then deposited that same envelope with the U.S. Postal Service on the same day with postage thereon fully prepaid in the ordinary course of business. I am aware that upon motion of a party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after date of deposit for mailing in the affidavit.

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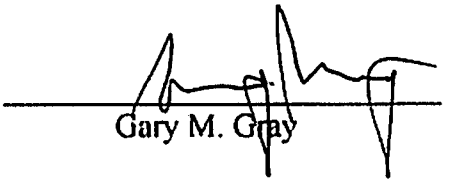
Executed March 18, 2014, at San Francisco, California.



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